

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by Irene
Gomez-Bethke, Commissioner,
Department of Human Rights,

Complainant,

FINDINGS OF FACT,
CONCLUSIONS OF

LAW
VS.

AND ORDER

Eastern Air Lines, Inc.,

Respondent.

The above-entitled matter is before State Hearing Examiner Jon L.
Lunde

pursuant to a Complaint and a Notice and Order for Hearing dated
April 6,

1983. No formal evidentiary hearing was held in this matter. In lieu
of a

formal hearing, the parties stipulated to the controlling facts and to
the use

of the deposition of one of the Respondent's witnesses in lieu of his
testi-

mony at a hearing as appears from correspondence on file herein.

Elizabeth V. Cutter, Special Assistant Attorney General, 1100
Bremer

Tower, Seventh Place and Minnesota Street, Saint Paul, Minnesota
55101,

appeared on behalf of the Complainant. Ella K. Solomons, Senior
Attorney,

Eastern Air Lines, Inc., Miami International Airport, Miami, Florida
33148,

appeared on behalf of the Respondent. The record closed on Monday,
August 15,

1983, when the last authorized brief was filed.

NOTICE

Pursuant to Minn. Stat. A 363.071, subd. 2 (1982), this Order is the final

decision in this case and under Minn. Stat. 363.072 (1982), the Commissioner

of the Department of Human Rights or any other person aggrieved by this

decision may seek judicial review pursuant to Minn. Stat. 14.63 through

14.69 (1982).

STATEMENT OF ISSUES

This case involves the following substantive and procedural issues:

whether or not Fisher's failure to file a verified charge with the Commissioner of Human Rights within six months of the unfair discriminatory

practice or the Department of Human Rights' failure to serve a copy of

Fisher's original charge upon the Respondent within five days after its

receipt requires dismissal of the charge and the Complaint herein; and (2) if

dismissal is not required, whether or not the Respondent discriminated against

the Charging Party on the basis of her marital status for purposes of Minn.

Stat. sec. 363.03, subd. 1(2)(c) (1977 Sapp.) Ili refusing her request for a

transfer under its anti-nepotism rules, or whether such rules constitute a

bona fide occupational qualification.

Based upon all the files, records and proceedings 'herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Gail Russell Fisher (the Charging Party) was employed by the Re-spondent (Eastern) as an agent from January 8, 1968 through September 30, 1978.

2. Fisher was based at Logan International Airport in Boston, Massachusetts from December 1, 1976 to March 31, 1978. Her last base monthly salary was \$1,418.00.

3. Fisher is and at all relevant times has been married to an Eastern employee.

4. Fisher's spouse was employed at Logan International Airport before and during the period that Fisher was employed there.

5. Fisher's spouse voluntarily transferred from Logan to the Minneapolis-St. Paul International Airport in March, 1978.

6. Eastern maintains and at all relevant times has maintained an anti-nepotism policy applicable to all related persons. That policy (Standard Practice 50-220-Relatives-Employment and Supervision) provides, among other things, that two spouses may not be employed in the same unit if either would report directly or indirectly to the other or both would report to the same manager.

7. Eastern's policy against hiring a husband and wife couple when both would be supervised by the same manager was in effect at all times relevant to this case. Fisher was aware of this policy no later than February 21, 1978.

B. All Eastern airport agents employed at the Minneapolis-St. Paul International Airport report to the same manager because of the small size of Eastern's operations there.

9. Eastern employs ticket agents at two city ticket offices in Minneapolis and Saint Paul. The ticket agents at the city ticket offices do not report to the same manager as the airport agents at the Minneapolis-St. Paul International Airport.

10. Pursuant to Eastern's anti-nepotism policy, on March 3, 1978, Fisher was denied a transfer request to the Minneapolis-St. Paul Airport ticket office after her spouse's transfer request was granted and he moved.

11. On March 3, 1978, Fisher requested a six-month leave of absence under

existing personnel rules. Toe leave of absence commenced March 31, 1978 and expired on September 30, 1978.

12. If a position as a ticket agent in the city ticket offices became available during the period of Fisher's leave of absence, she would have been eligible for a transfer. Further, Fisher was entitled to transfer to any other Eastern facility in the United States where an agent position was available and for which she was qualified. Fisher could also have remained an active employee at Logan International Airport in Boston an opening became available for her in either the Minneapolis or Saint Paul ticket offices.

13. Eastern employees are not required to take a leave of absence or resign while a transfer request is pending.

14. A full-time agent position with Eastern at the Minneapolis-St. Paul International Airport became available on July 12, 1978. Fisher would have

been eligible and qualified for that position at her last base salary but for Eastern's policy prohibiting related persons from reporting to the same manager.

15. Fisher's leave of absence expired September 30, 1978, and her resignation was effective on that date.

16. Chi August 11, 1978, Fisher wrote the Minnesota Department of Human Rights complaining about Eastern's refusal to permit her to transfer to a ticket agent position at the Minneapolis-St. Paul International Airport under Eastern's anti-nepotism policy. Her letter identified the parties and generally described the actiaa or practices complained (of but it was not verified. It was received byr the Department of Human Rights on August 14, 1978. (See, Ex. A attached to Complainant's Memorandum in Opposition to Fe-spondent's Motion to Dismiss).

17. A. copy of Fisher's August 11, 1978 letter was never served upon the Respondent.

18. Chi March 8, 1979, the Department received an affidavit from Fisher which reiterated the substance of her former charge against the Respondent. Copies of that affidavit were not served upon the Respondent.

19. On April 2, 1979, Fisher completed a formal, verified charge of discrimination on a Minnesota Department of Human Rights form. A copy of this charge was served upon the Respondent on April 5, 1979.

20. If the Respondent had been notified of Fisher's initial grievance in August, 1978, she could have been placed in an open position for which she had sufficient seniority. Such a position was available prior to September 30, 1978.

21. Since the Department of Human Rights did not serve Fisher's original grievance on the Respondent until nearly eight months after her initial grievance was filed, the Respondent concluded that it was impracticable to reinstate her and that its potential monetary liability had become too great to settle her charge.

Based upon Mae foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. That the Complainant gave proper notice of the hearing in this matter.

2. That the Hearing Examiner has subject matter jurisdiction herein and authority to order the relief granted pursuant to Minn. Stat. 363.071, subd. 2 (1978), as amended, and Minn. Stat. 14.50 (1982).

3. That the Respondent, Eastern Air Lines, is an employer as defined in Minn. Stat. sec. 363.01, subd. 15 (1978).

4. That the Minnesota Department of Human Rights failed to serve a copy of the Charging Party's original August 11, 1972 charge upon the Respondent within the five-day period specified in Minn. Stat. 363.06, subd. 1 (1978).

5. That the Respondent has been prejudiced by the Department's failure to serve a copy of that charge upon it because late service precluded settlement of the charge by exposing the Respondent to substantial damages or costs which could otherwise have been avoided.

6. That due to the Department of Human Rights' failure to properly notify the Respondent of the Charging Party's charge, that charge and the Cbm-

plainant's Complaint must be dismissed.

Based upon the foregoing Conclusions of Law and for the reasons set forth in the attached Memorandum:

IT IS ORDERED: That the Charging Party's charge and the Complainant's Complaint be and the same are hereby dismissed.

Dated: August 31, 1983.

JON L. LUNDE
Hearing Examiner

Reported: Stipulated Facts and Affidavits.

MEMORANDUM

Minn. Stat. 363.06, subd. 1 (1978), which pertains to the filing of

charges a,-id to notification of the Respondent of any charges filed, provides

in part as follows:

Any person aggrieved by a violation of this chapter may file a verified charge Atli the commissioner or his designated- agent, stating the name and address of the person alleged to have committed an unfair discriminatory practice, setting out the details of the practice complained of and any other information required by the commissioner. The commissioner within five days of such filing shall serve a copy of the charge upon the respondent personally or by registered or certified mail. . . .

Under Section 363.06, subd. 3 (1978), charges alleging unfair discriminatory

practice must be filed within six months after the occurrence of the

practice.

On May 25, 1983, Respondent filed a Motion to dismiss Fisher's charge and

the Complaint in this matter on the grounds that Fisher's charge was filed

approximately 13 months after the discriminatory practice complained of,

thereby depriving the Complainant and the Hearing Examiner of jurisdiction in

this matter under Minn. Stat. 363.06, subd. 3 (1978), which requires that

the charge be filed within six months after occurrence of the unfair dis-

criminatory practice. The motion was based on the fact that the dis-

criminatory practice occurred on March 3, 1978, when Fisher was advised that

she could not request a transfer to the Minneapolis-St. Paul International

Airport ticket office so long as her husband worked there. Since Fisher's

verified charge was not completed until April 2, 1979, and served upon the

Respondent until April 5, 1979, Respondent argued that both the charge and the

Complainant's Complaint must be dismissed.

On June 2, 1983, the Complainant filed its Memorandum in Opposition to the

Respondent's Motion, enclosing a copy of Fisher's original August 11, 1978

charge. Since the August 11 charge was filed within six months after Fisher

was denied a transfer to the Minneapolis-St. Paul International Airport ticket

office, Complainant argued that it was timely and that neither the charge nor

the Complaint should be dismissed.

Mae Hearing Examiner then requested that the parties address the efficacy

of the August 11 letter due to the fact that it was not verified. Additional

arguments were submitted by the parties on that issue. Mae Respondent's

position is that the August 11 charge should not be treated as timely for pur-

poses of Section 363.06, subs. 3, because it was not verified and was never

served upon the Respondent. In the alternative, it argues that if it is

treated as timely, it must still be dismissed because the Respondent was

prejudiced. It, the Department's failure to serve it with notice of the charge

until some eight months after it was filed. For the reasons hereinafter

discussed, the Hearing Examiner is persuaded that a timely charge of

discrimination was filed to, the Charging Party, but that as a result of the

Department's failure to serve a copy of that charge upon the Respondent, that

charge and the Complainant's Complaint in this case must be dismissed.

Prior to 1972, 42 U.S.C. 2000(e) 5(b) provided that verified charges of

discrimination could be filed with the Equal Employment Opportunity Commission

(EEOC) within 90 days of the discriminatory practice. However, EEOC regu-

lations provided that such charges could be amended for technical defects,

such as a lack of verification, and that such amendments would relate back to

the time the original charge was filed. 29 C.F.R. 1601.12(b). It was

determined early that the verification requirement in federal law was

directory and technical in nature rather than mandatory and substantive and

that the verification requirement was not, therefore, a jurisdictional re-

quirement. See, Choate in Caterpillar Tractor Co., 402 F.2d 357, 359 (7th

Cir. 1968). In that case, the Court refused to dismiss an unverified charge

because EEOC regulations made it possible to amend the original charge after

it was filed to add a verification. Mae Court could see no prejudice to the

employer if that practice was followed. See also, Russell v. American Tobacco

Co., 11 FEP 395, 401 (4th Cir. 1975). At the time of these decisions, federal

law did not permit the EEOC to bring suit on grievances filed with it and

there was no requirement that a copy of the charge be served upon the

employer. In Georgia Power Co. v. EEOC, 412 F.2d 462, 467, n. 10 (5th Cir.

1969), the Court noted as follows:

With regard to the limitation periods, the company has voiced one valid concern, viz., that the EEOC may not give a charged party notice of a pending charge within a reasonable time. While the Act provides that a charging party 'has ninety days from the (date of the unlawful employment practice within which to file a charge, there is no time prescribed within which the EEOC must serve a copy of the charge on the company. We therefore infer that service of the charge must be made within a reasonable time after receipt by the EEOC. The company in the instant case was served with the formal charge on November 23, 1967, seven days after the letter charge was amended [it was originally dated August 27, 1967] and eighty-six days after the letter was filed with the EEOC. In the circumstances of this case, we think that the EEOC acted with reasonable diligence. It may be noted, however, that the determination of reasonableness is an ad hoc matter; thus the EEOC would be well advised to furnish the charged party with a copy of the original charge immediately with a notation that a formal charge will-forthcoming.

In 1972, 42 U.S.C. 2000(e) 5(b) was amended to provide that charges

shall be in writing under oath or affirmation
of that

In view

amendment, containing the mandatory word "shall", one federal court held that

the verification requirement became jurisdictional and that the failure to verify the charge required its dismissal. *EEOC v. Appalachian Power Co.*, 13 FEP 1294 (W.D. Va. 1976), *aff'd*, 568 F.2d 354 (4th Cir. 1978). Other courts have continued to hold that the failure to file a verified charge is not a jurisdictional defect but a technical defect curable by amendment. See, e.g., *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74, 78-79 (5th Cir. 1982). In 1978, Minn. Stat. 363.06, subd. 1, was similar to 42 U.S.C.

2000(e)

5(b) prior to its amendment in 1972, insofar as it did not contain the mandatory word "shall" in referring to the verification of a charge.

Further-

more, Minn. Pule HumRts 102(e) provided that such charges could be amended to cure technical defects or omissions if the purposes of the Act will be served thereby. Although the agency's rule does not specifically make the lack of verification a technical defect which can be cured by an amendment, the Hearing Examiner believes that such an interpretation is the most appropriate one given the remedial purposes of the Act and the Charging Party's usual ignorance of statutory procedural requirements. Clearly, Hmrts 102(a) contemplates an informal charge. It requires only the name and address of the person filing the charge, the name and address of the person against whom the charge is filed, a clear and concise statement of the facts which may constitute an unfair discriminatory practice and the signature of the person filing the charge.

The purpose of requiring a verified charge is to help ensure that employers will not be harassed to, frivolous complaints. *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969). This purpose is met if the Department refrains from investigating a charge until it is sworn to by the charging party. Thus, the lack of verification should not affect its validity.

For these reasons, it is concluded that, in most cases, the failure to file a verified charge is not a jurisdictional defect requiring dismissal, and that such a defect may be cured by amendment before or after the expiration of

the six-month period authorized for the filing of charges. Da
this case,
therefore, it is concluded that Fisher's August 11, 1978 letter was
a timely
charge which was properly amended in April to provide the necessary
verifi-
cation. See, Heath v. D. H. Baldwin, Co., 447 F.Supp. 495 (N.D.
Miss. 1977)
and cases discussed therein.

However, the August 11, 1978 charge filed by]Asher was never
served on
the Respondent . Under Minn. Stat. 363.06, subd. 1 (1978), the
Department
was required to serve a copy of that charge upon the Respondent
personally or
by registered or certified mail, within five days of its filing. The
purpose
of the five-day requirement is to give prompt notice to the
employer that
charges have been filed against it. It implements and makes
effective the
same considerations underlying Minn. Stat. 363.06, subd. 3,
which requires
that the charge be filed within six months after the occurrence of
the unfair
discriminatory practice. The latter provision has been held to be a
jurisdic-
tional requirement. See, Minnesota Min. & Mfg. Co v. State, 289
N.W.2d 396
(Minn. 1979), appeal dism'd, 100 S.Ct. 725, 444 U.S. 1041, 62
L.Fd.2d 726.
Under federal law, the current 180-day period for filing charges is
not juris-
dictional but a limitation period which is subject to waiver,
estoppel and

equitable tolling.. See, *Zipes v. Trans World Air Lines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Based on the Minnesota Supreme Court's holding in the Minnesota Mining and Manufacturing Co. case, supra, the Court might hold the five-day notice provision to be a jurisdictional requirement and might not follow those federal cases holding that compliance with the current 10-day period contained in federal statutes is not jurisdictional, but a limitation period which is subject to equitable tolling.

However, even if the Minnesota Supreme Court were to follow federal case law, federal cases have recognized that the failure to serve notice of a charge upon the employer within the 10-day period specified will bar enforcement action by the agency when substantial prejudice results to the employer

willfulness or bad faith on the part of

the or when there is evidence of agency involved. See, *EEOC v. Airguide Corp.*, 539 F.2d 1038 (5th Cir. 1976) and *EEOC v. Burlington Northern, Inc.*, 25 FEP 499 (8th Cir. 1981). 1 In these cases it was held that while service of the charge upon the employer was to be treated as a limitation period, that the agency was at least required to show why the time limit was not complied with and that dismissal would be required in spite of the charging party's innocence where failure to serve the charge on the employer prejudiced it. Thus, on remand in, *EEOC v. Airguide Corp.*, 29 FEP 236 (S.D. Fla. 1978), a timely charge was dismissed by the Court where the EEOC's failure to notify the employer of the charge until 10 months after it was filed prevented the employer from settling the case. By the time the employer received notice of the charge, the charging party's backpay claim was in the thousands of dollars and the employer would either have to pay the claim or spend a substantial amount of money to defend itself.

In this case, the Department failed to serve the August 11, 1978 charge or Fisher's March 16, 1979 affidavit, upon the Respondent within the five-day period specified in Section 363.06, Subd. 1. Consequently, the Respondent had no notice whatsoever of Fisher's charge until April 5, 1979, almost 13 months

after the discriminatory act complained of and nearly eight months after her original charge was filed with it. It is concluded that the Department's unexplained failure to serve the August 11, 1978 charge on the Respondent substantially prejudiced it because the eight-month delay deprived the Respondent of the opportunity to promptly resolve Fisher's charge without paying a sizeable backpay claim and other damages or costs. Because of this prejudice, and considering the Act's requirement that employers received prompt notice of charges filed against them, it is concluded that the charge in this case must be dismissed.

In view of the dismissal of this matter, it is unnecessary and inappropriate to consider the merits of the Fisher's charge.

J.L.L.

In this case the EBOC actually mailed the charge in a timely fashion but it was never received by the employer.

